CORRECTED COPY

NO. 77-252

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

ALFONSO RIVERA, PETITIONER

V.

THE STATE OF TEXAS, RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE TEXAS COURT OF CRIMINAL APPEALS

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The Petitioner Alfonso Rivera respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Texas Court of Criminal Appeals entered in this proceeding on April 13, 1977, whereupon the Court of Criminal Appeals of Texas denied Petitioner's motion for re-hearing on May 3, 1977, and on the 12th day of May, 1977, said court denied Petitioner's motion to withdraw the mandate of affirmance which issued on May 6, 1977.

OPINION

The opinion of the Texas Court of Criminal Appeals on original submission of the cause and on the motion for re-hearing appears in the Appendix hereof.

JURISDICTION

The judgment of the Texas Court of Criminal

Appeals was entered and delivered on April 13, 1977. A timely petition for re-hearing was denied by order of the Texas Court of Criminal Appeals on May 3, 1977. The mandate of affirmance was issued by the Texas Court of Criminal Appeals on May 6, 1977. Appellant's motion to withdraw the mandate was filed with the Texas Court of Criminal Appeals denying Appellant's motion to withdraw the mandate was entered on May 12, 1977. This petition was filed within 90 days of that date. This court's jurisdiction is invoked under 28 U.S.C., Sec. 1257 (3).

QUESTIONS PRESENTED

1. Whether the non-disclosure of a medical report given to the District Attorney which contained evidence favorable to the defendant convicted of indecency with a child arising out of a two-count indictment which also charged the offense of rape constitutes a denial of the effective assistance of counsel, because it was of material importance to the defense, guaranteed by the Sixth and Fourteenth Amendments to the constitution of the United States, and of the right to a fair trial as guaranteed by the Due Process Clause of the Fourteenth Amendment, in a case where the trial Judge declines to grant a mistrial upon the proper motion by defense counsel to disclose said report.

2. Whether the acts of the prosecutor show a consistent disregard for Defendant's rights to a just, fair and impartial trial as required by the Due Process Clause of the Fourteenth Amendment where the District Attorney did not present the full extent of his investigations to the Grand Jury which indicted Defendant on a two-count indictment charging him with rape and indecency with a child, where said investigation revealed

evidence which exhonerated the Defendant from the charges of rape.

STATEMENT OF FACTS

The Defendant was convicted on an indictment charging him with the commission of the offense of indecency with a child. On the Defendant's plea of not guilty, the trial was held before a jury. The punishment assessed by the jury was two and one-half years confinement in the State Penitentiary. The Appellant appeals from the judgment of conviction.

The evidence adduced at the trial tended to show the following facts:

On November 2, 1974, Julia De Luna, age 6, went to Defendant's house to play with Defendant's children. She testified that she had gone over numerous times. On November 2, 1974, after playing for a while she returned home whereupon her mother, Dolores De Luna, noticied that Julia's panties were stained. But she did not question Julia right away (Tr. 42:25. Tr. refers to the Statement of Facts prepared by the Court Reporter, 42 to page number, 25 for line number. For expediency this will be the form used.) The child had not complained about anything. Julia was taken to see Dr. E.D. Salinas, Jr., on November 3, 1974 (Tr. 48:8-9), at which time Dr. Salinas noticed a vaginal discharge. The Dr. found no evidence of rape or injuries to the area (Tr. 50). The doctor found no evidence of blood (Tr. 56:18-19). The doctor advised the State on November 19, 1974, that there was no evidence of rape (Tr. 55). This information favorable to the defense was withheld by the State (Tr. 58:14 to Tr. 60:25). The record does not reflect as to whether or not this particular evidence was given

to the Grand Jury. There is conflicting testimony as to whether or not the Defendant was ever alone with the child.

REASONS FOR GRANTING THE WRIT

1. Whether the non-disclosure of a medical report given to the District Attorney which contained evidence favorable to the Defendant convicted of indecency with a child arising out of a two-count indictment which also charged the offense of rape constitutes a denial of the effective assistance of counsel, because it was of material importance to the defense, guaranteed by the Sixth and Fourteenth Amendments to the constitution of the United States, and of the right to a fair trial as guaranteed by the Due Process Clause of the Fourteenth Amendment, in a case where the trial Judge declines to grant a mis-trial upon the proper motion by defense counsel to disclose said report.

The trial court erred in not granting a mistrial upon proper motion by defense counsel when it became evident that the District Attorney had withheld evidence favorable to the defense. The testimony of Dr. Salinas, in toto, Tr. 47 to Tr. 60 inclusive, particularly at page 55, et seq., reveals a deliberate attempt by the District Attorney and his staff to withhold information favorable to the defense in view of the fact that the Defendant was originally charged with the offense of rape and an examining trial was held subsequent to that date and anterior to the presentment of the indictment in this case, when the prosecuting attorney and his staff knew, or should have known, that rape was out of the question. By withholding said evidence and information, the Defendant was at a disadvantage because he was concentrating his defense to a charge of rape and

not to indecency with a child. Furthermore, defense counsel diligently tried to obtain the evidence and the reasons for the withholding of same but the court refused to grant defense counsel an opportunity to so discover (Tr. 3). See also Appellant's motion for a new trial paragraph 2.D. at page 136 of the record prepared by the District Clerk of the 49th Judicial District. Brady v. Maryland, 373 U.S. 83 (1963); Ridyolph v. State, 503 S.W. 2d 276 (Tex. Cr. App., 1974).

The Sixth Amendment right to counsel, incorporated into the Fourteenth Amendment by Gideon v. Wainwright, 372 U.S. 335 (1963), guarantees more than that the Defendant should have a lawyer. This right assures "effective aid in the preparation and trial of the case," Powell v. Alabama, 287 U.S. 45, 71 (1932), and it may be violated whenever defense counsel is required to operate under circumstances that render his services ineffective, Ferguson v. Georgia, 365 U.S. 570 (1961). In the instant case, defense counsel at the trial stage kept working under the impression that he was defending a rape case. If adequate "time" to prepare is a constitutional mandate, it is not evident why adequate "information" to prepare is not. In 1970 and again in 1972, the Supreme Court recognized that the pre-trial gathering of information is a vital part of the effective assistance of counsel that the constitution commands, Coleman v. Alabama, 399 U.S. 1, 9 (1970); Adams v. Illinois, 405 U.S. 278, 281-82 (1972).

Again in Cole v. Arkansas, 333 U.S. 196, 201 (1948), the Supreme Court recognized the "principle of procedural due process...that notice of the specific charge, and a chance to be heard in a trial of the issues raised by that charge, if desired, are among the constitutional rights of

every accused in a criminal proceeding in all courts, state or federal." The notice of the charges should be given sufficiently in advance of the scheduled proceedings so that counsel would have a reasonable opportunity to prepare, and said notice must "set forth the alleged mis-conduct with particularity." In Re Gault 387 U.S. 1, 33 (1967). This principle may be referred to the express right given an accused by the Sixth Amendment "to be informed of the nature and cause of the accusation." See dictum in Faretta v. California, 422 U.S. 806, 818 (1975).

2. Whether the acts of the prosecutor show a consistent disregard for Defendant's rights to a just, fair and impartial trial as required by the Due Process Clause of the Fourteenth Amendment where the District Attorney did not present the full extent of his investigations to the Grand Jury which indicted Defendant on a two-count indictment charging him with rape and indecency with a child, where said investigation revealed evidence which exhonerated the Defendant from the charges of rape.

It is evident from the record that there was a consistent show of disregard for Defendant's right to a just, fair and impartial trial. A right to a fair trial is a right protected by the Due Process Clause of the Fourteenth Amendment. Irvin v. Dowd, 366 U.S. 717 (1961). Defense counsel filed a "Discovery Motion" (Record on Appeal, pp. 107-110, to the Court of Criminal Appeals) on March 27, 1975. The Defense further filed a "Motion to Exclude Evidence" on April 18, 1975, (Rec. on App., p. 111). Since no action was taken by the Trial Judge, the Defense was obligated to file a "Motion for Action on Defendant's Discovery Motion" on April 18, 1975, (Rec. on App., pp. 112-113). Even after all of these motions had been

filed, the Trial Judge took no action on any of the motions, or at least, no action is indicated in the "Record on Appeal." During all this time, the District Attorney, knowing that there was no evidence of rape, continually led the community to believe that a rape had been committed upon Julia De Luna. This can be substantiated by the indictment returned on March 19, 1975, by the Grand Jury of Webb County, Texas, for the March Term, 1975, (Rec. on App., p.104).

Such an indictment would not have been returned if the District Attorney had presented the full extent of his investigations; in particular, the oral communication that Dr. E.D. Salinas, Jr., made to the District Attorney's office to the effect that the complainant was not suffering from gonorrhea; the original reason for fearing that the child had been sexually molested.

A reversal must follow if the prosecutor deliberately presented a false picture of the facts, or if the prosecutor failed to correct testimony when it became apparent that said testimony was false, or if the prosecutor actively suppressed evidence which exhonerated the Defendant from the charges of rape, even though Defense Counsel was not diligent in his preparation for trial. The ultimate goal is fairness and due process. Means v. State, 429 S.W. 2d 490 (1968); Erisman, Manual of Reversible Errors in Texas Criminal Cases, (1974) at pp. 362-363.

If the District Attorney's office had acted in full candor in the interest of justice as his oath requires him to do, and if he had presented the complete truthful evidence in his possession to the Grand Jury, the indictment returned would have premitted Defense Counsel thorough preparation for trial, therefore minimizing surprise when the case

was called for trial, even though Defense Counsel on Appeal knows that the record does not reflect that "surprise" was claimed at the time of trial. However, it is our contention that the District Attorney governed his conduct as a means of surprise and gamesmanship upon Defense Counsel. Whether it is written in case law, constitutions or statutes, when life and liberty of the accused and the protection of the community are at stake, gamesmanship is out of place. Excesses should be discouraged in our adversary system.

Defendant claims that because the District Attorney withheld evidence from Defendant and from the Grand Jury, that no rape had been committed, then there existed a manifest necessity for the trial court to declare a mistrial, if not, "the ends of public justice would otherwise be defeated." United States v. Dinnitz, 96 S. Ct. 1075 (1976).

Each case must be dealt with individually. The standard applied in Means v. State, supra, was whether the testimony "may have had an effect on the outcome of the trial." We believe that it would have. The testimony of Dr. Salinas needed to be revealed to the Grand Jury. If his findings had been revealed through testimony or statements made to the Grand Jury, in all probability the Defendant would not have been indicted for rape. Not being informed of the findings and probable testimony of Dr. Salinas, the Grand Jury returned a two-count indictment. This indictment was the one that the Petit Jury had to work with. It is a fair assumption in criminal cases that when a Jury knows that the accused has been charged with two offenses and the District Attorney dismisses as to the greater offense, then a Jury is inclined to convict on the premise that the accused has already been given a "break." The record reflects

that the "Motion to Elect" filed by the Defense on April 18, 1975, (Rec. on App., p. 114), was acted upon on April 23, 1975, while the Jury was present as reflected by the docket sheet (Rec. on App., p. 105). The practice of acting upon Motions in the presence of the Jury should be done away with, not necessarily to prevent a Jury from finding out the whole truth, but so that only the truth will be presented to the Jury. The District Attorney knew full and well that no rape had been committed because his evidence told him that no rape had been committed.

It has been said that the intangibles cannot be argued because they are not written into the record. However, Defendant urges, that since there was an unfair balance of advantage favoring the prosecution, that Mr. Justice Cardozo's famous phrase about keeping "the balance true" may be a constitutionally inforceable right of the Defendant. See Wardius v. Oregon, 412 U.S. 470 (1973); United States v. Ash, 413 U.S. 300 (1973); and Snyder v. Massachusetts, 291 U.S. 97 (1934).

CONCLUSION

For these reasons a writ of certiorari should be issued to review the judgment of the court below and opinion of the Texas Court of Criminal Appeals.

Respectfully submitted,

Dated: August 10,1977.

EMILIO DAVILA

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Laredo, Texas 78040

COUNSEL FOR PETITIONER ON APPEAL ONLY

CERTIFICATE OF SERVICE

I hereby certify that on the 10th day of August, 1977, three copies of the petition for writ of certiorari were mailed, postage prepaid, to the Honorable John Hill Attorney General of the State of Texas, Supreme Court Building, Austin, Texas 78701, Counsel for the Respondent. I further certify that all parties required to be served have been served.

COUNSEL FOR PETITIONER

APPENDIX

NO. 52,585

ALFONSO RIVERA, APPELLANT	)	APPEAL FROM
VS.	)	
THE STATE OF TEXAS, APPELLEE	)	WEBB COUNTY

OPINION

Appellant was charged in a two-count indictment with the offenses of rape and indecency with a child. Pursuant to appellant's motion to elect, the State prosecuted the offense of indecency with a child for which appellant was convicted. His punishment was fixed by the jury at confinement for two and one-half years.

The six-year old complainant testified that appellant touched her private parts with his finger and his private part. The court ruled that the six-year old was competent to testify after she had responded "Yes" to the court's inquiries whether she knows that she has to tell the truth, that if she did not tell the truth she will get punished, that there is a God, that God wants her to tell the truth, that if she does not tell the truth God will punish her, and that she does want to tell the truth.

Appellant challenges, by his first ground of error, the court's ruling. The gravamen of the challenge is that the court did not ask the witness if she knew the meaning of the oath or ask enough questions to test her competency. We perceive no error.

The question of the competency of a witness is

for determination by the trial court, and its ruling thereon will not be distrubed unless an abuse of discretion is shown. In considering whether an abuse of discretion is shown in admitting a childs testimony, a review of the child's entire testimony is made to ascertain the question of competency. Fields v. State, 500 S.W. 2d 500, 502-03 (Tex. Cr. App. 1973).

The fact that the witness was not asked about the oath is not controlling; more important is that she knew she had to tell the truth and that she would be punished if she did not do so. See Fields v. State, supra, at 502. Her entire testimony reveals that she possessed sufficient intellect to relate, with reasonable clarity for her age, the matter about which she was interrogated, and appellant does not contend that there are any inconsistencies in her account of the occurrence. We, therefore, cannot say that the trial court abused its discretion in ruling that she was a competent witness. The first ground is overruled.

Next, appellant complains of the res gestae admission of the child's statements reported by her mother. The premise for appellant's argument is that it is a logical conclusion that the statements were made from eight to ten hours following the incident and therefore they were not spontaneous. The record refutes the premise.

The child acknowledged that on the day the indecency occurred she ran home and told her mother about it. The mother, called as a witness by appellant, stated that on that day when she noticed the child had some spots on her panties, she questioned her about what happened, "(n)ot right away" but "after a little while" when she found something unusual, abnormal about her private parts. Thereafter, on cross-examination,

the State elicited the statements.*

The time elasping between the event and the statements is not alone determinative; the deciding factor is spontaneity. Williams v. State, 145 Tex. Cr. R. 536, 170 SW. 2d 482, 490 (1943). Here, when she was first asked, the young child told her mother what had happened. In Heflin v. State, 161 Tex. Cr. R. 41, 274 S.W. 2d 681, 683-84 (1955), the child's statements made after a greater lapse of time and following more persistent questioning by the mother than is recorded here, were admitted under the res gestae rule. The second ground is overruled.

'The third and final ground is that the court erred in overruling appellant's motion for mistrial when appellant claimed the district attorney had withheld evidence favorable to the defense. Although appellant does not specify the evidence, it appears to be the oral communication Dr. Ezequiel D. Salinas, Jr., made to the district attorney's office to the effect that the six-year

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*We will assume, without deciding, that appellant did not invite the cross-examination and that his objection was timely. While the mother was testifying as appellant's witness, she was asked, "the child came and told you that Poncho Rivera had been bothering her?" A sustained objection to the leading nature of the question forestalled the answer. Subsequently, the mother testified to two statements made by the child before appellant interposed any objection.

old complainant was not suffering from gonorrhea. Reliance is had upon Brady v. State of Maryland, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963), and Ridyolph v. State, 503 S.W. 2d 276 (Tex. Cr. App., 1973). Those cases make it clear that it is reversible error if the prosecutor actively suppresses evidence which may exhonerate the accused or be of material importance to the defense. Consistent therewith, those cases require as a predicate for reversal a finding of the materiality of the evidence, and the standard to be applied is, as noted in Crutcher v. State, 481 S.W. 2d 113, 116 (Tex. Cr. App., 1972), whether the evidence "may have had an effect on the outcome of the trial."

Appellant does not contend that the information was material to the charge of indecency with a child for which he was tried and convicted; rather, his complaint is that the withholding of the information placed him at a disadvantage in preparing a defense to the first count of rape in the indictment. Whether the complainant did or did not have gonorrhea was not material to the charge of indecency with a child, and in any reasonable likelihood the evidence, if admissable at all, could not have affected the outcome of the trial. The last ground is overruled.

No reversible error is shown. The judgment is affirmed.

PER CURIAM

(Delivered April 13, 1977)

COURT OF CRIMINAL APPEALS OF TEXAS

CLERK'S OFFICE

Austin, Texas, May 3, 1977

Dear Sir:

I have been instructed to advise that the Court has this day denied "Leave To File" the Appellant's Motion for Re-hearing in Cause No. 52,585, ALFONSO RIVERA VS. THE STATE OF TEXAS, APPELLEE

Sincerely yours,

THOMAS LOWE, CLERK

No. 52,585

MANDATE

from

COURT OF CRIMINAL APPEALS

Austin, Texas

ALFONSO RIVERA, APPELLANT

vs.

THE STATE OF TEXAS, APPELLEE

Issued May 6, 1977

THOMAS LOWE, Clerk

/s/ Belva Myler, Deputy Clerk

TRIAL COURT NO. 16,283

THE STATE OF TEXAS.

TO THE 49TH JUDICIAL DISTRICT COURT OF WEBB COUNTY-GREETING:

Before our COURT OF CRIMINAL APPEALS, on the 3rd day of May, A.D. 1977, the cause upon appeal to revise or reverse our judgment between

ALFONSO RIVERA, APPELLANT

No. 52,585 vs.

THE STATE OF TEXAS, APPELLEE,

was determined; and therein our said COURT OF CRIMINAL APPEALS made its order in these words:

"This cause came on to be heard on the transcript of the record of the Court below, and the same being considered, because it is the opinion of this Court that there was no error in the judgment, it is ordered, adjudged and decreed by the Court that the judgment be in all things affirmed, and that the appellant pay all costs in this behalf expended, and that this decision be certified below for observance."

Appellant's Motion for Leave to File Motion for Re-hearing is Denied.

WHEREFORE, We command you to observe the order of our said COURT OF CRIMINAL APPEALS in this behalf and in all things to have it duly recognized, obeyed and executed.

WITNESS, the HON. JOHN F. ONION, JR., Presiding Judge of our said COURT OF CRIMINAL APPEALS, with the Seal thereof annexed, at the City of Austin, this 6th day of May, A.D. 1977.

THOMAS LOWE, Clerk

/s/ Belva Myler
Deputy Clerk

No. 52,585

ALFONSO RIVERA, APPELLANT	IN THE COURT OF CRIMINAL APPEALS
vs.	of
THE STATE OF TEXAS, APPELLEE	THE STATE OF TEXAS

APPELLANT'S MOTION TO WITHDRAW THE MANDATE

. . .

Filed in Court of Criminal Appeals,
May 12, 1977

Thomas Lowe, Clerk

. . .

ORDER

On this the 12th day of May, A.D. 1977, came on to be considered appellant's motion to withdraw the mandate and the entire court having duly considered said motion, it is the opinion of the Court that said motion should be denied. It is ordered .

/s/JOHN F. ONION, JR.
Presiding Judge